

# VU Research Portal

## Framework Decision on combating terrorism: two questions on the definition of terrorist offences

Borgers, M.J.

### ***published in***

New Journal of European Criminal Law  
2012

### ***document version***

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

### ***citation for published version (APA)***

Borgers, M. J. (2012). Framework Decision on combating terrorism: two questions on the definition of terrorist offences. *New Journal of European Criminal Law*, 2012(1), 68-82.

### **General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

### **Take down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

### **E-mail address:**

[vuresearchportal.ub@vu.nl](mailto:vuresearchportal.ub@vu.nl)

## ARTICLES

# FRAMEWORK DECISION ON COMBATING TERRORISM: TWO QUESTIONS ON THE DEFINITION OF TERRORIST OFFENCES

MATTHIAS J. BORGERS\*

### ABSTRACT

*This contribution discusses two questions arising in relation to the definition of terrorist offences in the Framework Decision on combating terrorism. Firstly, the question is considered as to what extent this definition contains a requirement of endangerment that Member States have to include in their national legislation. Secondly, the Framework Decision's significance for the position of activists, demonstrators and strikers will be addressed.*

**Keywords:** combating terrorism; protest, demonstration and strike; terrorist intent

### 1. INTRODUCTION

The attacks on the Twin Towers in New York took place ten years ago. Partly in due of the attacks huge numbers of regulations directed at combating terrorism on a global, European and national level were subsequently enacted across the world. Soon after the 11 September 2001 attacks, the European Commission took the initiative to publish a Framework Decision on combating terrorism ('the Framework Decision').<sup>1</sup> After some amendments, the Framework Decision was adopted as early as 13 June 2002,<sup>2</sup> in order to harmonise what constitutes criminal acts relating to terrorism in the national legislation of Member States.

The most important provision of the Framework Decision is Article 1, which describes the conditions in which criminal acts will be considered terrorist offences. First of all, nine categories of behaviour are listed that, if committed intentionally, will

---

\* Professor of criminal law and criminal procedure, VU University Amsterdam, m.j.borgers@vu.nl.

<sup>1</sup> COM(2001) 521 final.

<sup>2</sup> OJEC 2002, L 164/3.

be considered terrorist offences. Next, it is stated that these nine categories of behaviour must be “*defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation*”. Finally, terrorist intent – that is, any of the varieties of intent mentioned in Article 1(1) – must be present.

This definition of terrorist offences prompts several questions, of which I will discuss two in this contribution. I will first discuss the second part of the definition in the Framework Decision, being the requirement that it concerns “*offences under national law, which, given their nature or context, may seriously damage a country or an international organisation*”. To what extent was the stipulation of an independent requirement of endangerment intended? Secondly, the position of activists, demonstrators and strikers under this Framework Decision will be discussed. To what extent will criminal acts committed by such individuals fall within the definition of terrorist offences? As will be shown, this question is closely connected to the meaning of ‘terrorist intent’, the third element of the definition of terrorist offences in the Framework Decision.

## 2. REQUIREMENT OF ENDANGERMENT?

### 2.1. DIFFERENT POSSIBLE INTERPRETATIONS

It is usually assumed in literature that the phrase “*which, given their nature or context, may seriously damage a country or an international organisation*” should be regarded as an objective requirement for qualifying punishable behaviour as a terrorist offence.<sup>3</sup> It is argued that this means a requirement for the behaviour, given its nature and

<sup>3</sup> See S. Peers, ‘EU Responses to Terrorism’, *International and Comparative Law Quarterly* 2003, p. 228; E. Symeonidou-Kastanidou, ‘Defining Terrorism’, *European Journal of Crime, Criminal Law and Criminology* 2004, p. 24; F. Verbruggen, ‘Bull’s-eye? Two Remarkable EU Framework Decisions in the Fight against Terrorism’, in: C. Fijnaut, J. Wouters & F. Naert (eds.), *Legal Instruments in the Fight Against International Terrorism. A Transatlantic Dialogue*, Leiden: Martinus Nijhoff Publishers 2004, p. 318; E. Dumitriu, ‘The E.U.’s Definition of Terrorism: The Council Framework Decision on Combating Terrorism’, *German Law Journal* 2004, pp. 592 and 595–596; E.J. Husabø, ‘The Implementation of New Rules on Terrorism through the Pillars of the European Union’, in: E.J. Husabø & A. Strandbakken (eds.), *Harmonization of criminal law in Europe*, Antwerp/Oxford: Intersentia 2005, pp. 61–62; B. Saul, *Defining Terrorism in International Law*, Oxford: Oxford University Press 2006, p. 164; S. Voigt, ‘Der EU-Rahmenbeschluss zur Terrorismusbekämpfung – ein wirksames Mittel der Terrorabwehr?’, in: E. Müller & P. Schneider (eds.), *Die Europäische Union im Kampf gegen den Terrorismus: Sicherheit vs. Freiheit?*, Baden-Baden: Nomos 2006, p. 216; E.J. Husabø, ‘The Interaction between Global, Regional and National Regulation in the Definition of Terrorism’, in: A. Follesdal, R.A. Wessel & J. Wouters (eds.), *Multilevel Regulation and the EU. The Interplay between Global, European and National Normative Processes*, Leiden: Martinus Nijhoff Publishers 2007, p. 175 and C. Kreß & N. Gazeas, ‘Terrorismus’, in: U. Sieber, F.-H. Brünner, H. Satzger & B. Von Heintschel-Heinegg (eds.), *Europäisches Strafrecht*, Baden-Baden: Nomos 2011, p. 341.

context, to pose a certain threat of politically or publicly motivated violence.<sup>4</sup> It must be established, on the basis of the specific behaviour and the circumstances in which it took place, whether serious damage was caused to a country or an international organisation, or whether a certain threat of such damage existed. This can then be regarded as a requirement of endangerment. If no damage was caused and no threat of damage existed in a specific case, the qualification ‘terrorist offence’ would not apply. This establishes a clear distinction between terrorist and non-terrorist varieties of the punishable behaviour referred to in Article 1(1).<sup>5</sup>

Whether the drafters of the Framework Decision indeed intended the second part of Article 1(1) to serve as an objective requirement is neither positively nor negatively evidenced by the history of the Framework Decision. There may be some doubt as to whether the second part of Article 1(1) should in fact be interpreted as a ‘hard’ objective requirement.

If one concentrates, from a textual point of view, on the Dutch and German language versions,<sup>6</sup> the quoted phrase could be regarded as a descriptive sub-clause, and not as a separate requirement. The text then plainly reads that, depending on their nature or context, the nine categories of punishable behaviour listed may seriously damage a country or an international organisation. In this interpretation a sort of explanation of the nine categories of punishable behaviour is given: these offences are *in abstracto* so serious that they are generally suited – or, to formulate it more cautiously, not in themselves unsuited – to seriously damaging a country or international organisation.<sup>7</sup> This does not mean that the serious damage, or the chance thereof, will manifest itself on each occasion. The punishable behaviour referred to in this Article certainly does not have to be specifically directed against a country or international organisation.

In the English and French versions, however, Article 1(1) reads somewhat differently from the Dutch and German versions. The quoted phrase in these versions appears to be connected with terrorist intent: the behaviour may, given the nature or context, cause serious damage to a country or international organisation *if* it is

<sup>4</sup> Cf. B. Saul 2006, pp. 38 and 61 with respect to the type of violence.

<sup>5</sup> E. Dumitriu 2004, p. 592 and S. Voigt 2006, p. 216. Also cf. E. Symeonidou-Kastanidou 2004, pp. 25–26.

<sup>6</sup> The first part of Article 1(1) in the German language version of the Framework Decision states that “Jeder Mitgliedstaat trifft die erforderlichen Maßnahmen, um sicherzustellen, dass die unter den Buchstaben a) bis i) aufgeführten, nach den einzelstaatlichen Rechtsvorschriften als Straftaten definierten vorsätzlichen Handlungen, die durch die Art ihrer Begehung oder den jeweiligen Kontext ein Land oder eine internationale Organisation ernsthaft schädigen können, als terroristische Straftaten eingestuft werden, wenn sie mit dem Ziel begangen werden, (...)”. In the Dutch language version: “Iedere lidstaat neemt de maatregelen die noodzakelijk zijn om ervoor te zorgen dat de onder a) tot en met i) bedoelde opzettelijke gedragingen, die door hun aard of context een land of een internationale organisatie ernstig kunnen schaden en die overeenkomstig het nationale recht als strafbare feiten zijn gekwalificeerd, worden aangemerkt als terroristische misdrijven, indien de dader deze feiten pleegt met het oogmerk om (...)”.

<sup>7</sup> Cf. E. Symeonidou-Kastanidou 2004, p. 25.

committed with terrorist intent.<sup>8</sup> In this interpretation of Article 1(1), terrorist intent colours the nature of the offence and the circumstances in which it is committed. The offender's objective of causing serious damage to a country or international organisation is contained in the terrorist intent.<sup>9</sup> The reference to 'nature or context' could then be seen as a reference to the combination of an inherently serious criminal act *and* the presence of terrorist intent, with the factual consequence that the specific behaviour may seriously damage a country or international organisation.

It is also possible to establish a link in another way between the nature and/or context of the specific behaviour on the one hand and the presence of terrorist intent on the other. Not only does the existence of that intent say something about the endangerment posed by the specific behaviour, but something about the existence of terrorist intent can also be inferred from the nature and context of the behaviour.<sup>10</sup> Some acts are of such a serious and destructive nature that, even if nothing is known about the offender's objective, this indicates the act was committed with terrorist intent. Here the emphasis is not on setting an independent requirement of endangerment resulting from the nature and/or context of the specific behaviour, but instead on establishing a form of evidence in which that nature and context are key.

## 2.2. DISTINCTION BETWEEN TERRORIST AND NON-TERRORIST OFFENCES

The above shows that the second part of Article 1(1) can be interpreted and applied such that it is not considered an independent and objective requirement for qualifying punishable behaviour as a terrorist offence. In view of the different approaches to the phrase "given their nature or context, may seriously damage a country or an international organisation", it can furthermore be concluded that there are essentially two possible ways of distinguishing the terrorist offences listed in Article 1(1) from non-terrorist offences.

<sup>8</sup> The first part of Article 1 in the English language version of the Framework Decision states that "Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: (...) shall be deemed to be terrorist offences (...)". In the French language version: "Chaque État membre prend les mesures nécessaires pour que soient considérés comme infractions terroristes les actes intentionnels visés aux points a) à i), tels qu'ils sont définis comme infractions par le droit national, qui, par leur nature ou leur contexte, peuvent porter gravement atteinte à un pays ou à une organisation internationale lorsque l'auteur les commet dans le but de: (...)".

<sup>9</sup> Here I consider seriously intimidating a population to be on a par with seriously damaging a country.

<sup>10</sup> Cf. E.J. Husabø 2005, p. 61; B. Saul 2006, p. 164 and T. Weigend, 'The Universal Terrorist. The International Community Grappling with a Definition', *Journal of International Criminal Justice* 2006, pp. 924 and 931–932. B. Saul adds (in note 209) that in the UN Convention on Suppression of Financing of Terrorism, which constituted a source of inspiration for the drafting of the Framework Decision, the mentioning of the nature or context of the punishable behaviour was specifically meant to avoid a need to prove a "subjective mental state".

Firstly, this distinction can be made primarily on the basis of *the degree of endangerment* in the specific punishable behaviour.<sup>11</sup> The second part of Article 1(1) is then regarded as a separate (objective) requirement. The main consequence of this view is that the existence of terrorist intent is not the decisive factor in qualifying punishable behaviour as a terrorist offence. In other words, punishable behaviour within the meaning of Article 1(1) can be committed *with* terrorist intent, but will not be qualified as a terrorist offence if the degree of endangerment represented by that behaviour – in relation to a country or international organisation – is insufficient. This, it is argued, creates a certain protective mechanism, specifically in relation to political activist acts with a relatively minor effect.<sup>12</sup>

A question that can be raised in relation to this first approach is whether the requirement of endangerment as envisaged here makes it *too* difficult to qualify punishable behaviour as terrorist. Weigend stated that, as far as the letter of the law is concerned, the requirement is relatively strict in that an act must cause damage to an entire country or an international organisation, or at least create a real risk of such damage. If this requirement is strictly applied, qualification as terrorist intent is confined to the most heinous and dangerous acts. Consequently, an act of the magnitude of the 11 September 2001 attacks would qualify as such, but whether a ‘normal’ bomb attack by the IRA or ETA would be unclear.<sup>13</sup> However, whether the requirement of endangerment should be viewed so strictly is not evident. It is true that the 11 September 2001 attacks acted as a catalyst for the Framework Decision, but there is nothing to suggest that the Framework Decision should automatically be assigned such a limited scope of applicability. Furthermore, the question of what constitutes ‘serious damage’ is also similarly vague,<sup>14</sup> such that a less far-reaching explanation may suffice. Weigend has consequently sought to provide a basis for a different explanation:

“A sensible interpretation of this clause might take as the point of reference for any ‘damage’ the ability of the state to credibly fulfil its main functions of providing basic means of survival and infrastructure as well as fundamental public security to its citizens. ‘Damage’ to these functions can occur through large-scale interference with the provision of water, energy and traffic routes but also through random attacks on individuals, which put into question the state’s ability to provide protection for life and limb”.<sup>15</sup>

This point of departure would allow the range of acts falling under the scope of terrorist offences to be wider than those of 11 September 2001, without losing the

<sup>11</sup> ‘Primarily’ because the existence of terrorist intent – the third part of Article 1(1) – is then also a requirement.

<sup>12</sup> Cf. F. Verbruggen 2004, p.318, who argues that “isolated cases of politically motivated violence” cannot be considered to be terrorist offences.

<sup>13</sup> T. Weigend 2006, p. 927.

<sup>14</sup> Cf. also E. Symeonidou-Kastanidou 2004, p. 26 and S. Voigt 2006, p. 225.

<sup>15</sup> T. Weigend 2006, p. 930 (note 79).

emphasis on the need for serious damage, or the chance thereof, to be created for a country as a whole (or an international organisation).

Conversely, it is also possible to opt for a relatively flexible rather than for a relatively strict interpretation of the requirement of endangerment. This could be opted for on the grounds that it can be difficult to ascertain the degree to which specific behaviour in a specific case has the ability to seriously damage a country or an international organisation. Possession of weapons and explosives, one of the offences listed in Article 1(1), is an example of this. Whether such possession is intended to seriously damage a country or international organisation cannot be determined solely on the basis of the offence itself. More information about what the person involved planned to do with the weapons or explosives would be needed. Similar considerations apply with respect to offences that do not go beyond an attempt or which have a different – in other words, less serious – effect than was intended, such as a bomb that does not explode or causes far less damage than the offender had hoped. Against this background, a court could decide that it is sufficient to interpret the requirement of endangerment in a manner that ties in with the nature of the committed offence: is the offence *generally* suited to seriously damaging a country or an international organisation? In addition, or instead, a link could be sought with the offender's intention: can it be derived from this intention that there was a chance of serious damage to a country or international organisation? In this approach, the requirement of endangerment is viewed in close conjunction with the first and/or third part of Article 1(1). Such a flexible interpretation of the requirement of endangerment is not contrary to the wording of the Framework Decision as serious damage is not required actually to occur; the possibility thereof is sufficient.<sup>16</sup>

Secondly, *the existence or absence of terrorist intent* can be regarded as the criterion distinguishing the terrorist offences listed in Article 1(1) from non-terrorist offences. In this approach, the causing of serious damage, or the chance thereof, to a country or international organisation is not deemed totally irrelevant since the endangerment criterion is to a certain extent incorporated in the nine categories of punishable behaviour referred to in Article 1(1).<sup>17</sup> This list refers to serious punishable behaviour that is in itself suited to causing serious damage to a country or international organisation. Such damage, or at least the chance thereof, will usually occur if an act is committed with terrorist intent. A key aspect in this approach is that it avoids burdening the court with the more concrete, but difficult assessment whether there was a chance of serious damage to a country or international organisation. Hence, the

<sup>16</sup> Cf. also V. Hameeuw, 'Strafbaarstelling van terroristische misdrijven: van Europees Kaderbesluit tot het Belgische Strafwetboek' ['Penalizing terrorist offences: from the European Framework Decision to the Belgian Criminal Code'], *Tijdschrift voor Strafrecht* 2005, p. 6.

<sup>17</sup> A certain condition is contained herein. If the list of punishable forms of behaviour in Article 1(1) were more elaborate and had thus also included less serious offences, it may have been necessary to give the second part of Article 1(1) a useful and independent role as an objective requirement restricting the possibility to qualify punishable behaviour as terrorist offence.

decisive question concerns the offender's objective: if that objective comes down to terrorist intent, punishment for committing a terrorist offence is possible.

There is a certain cohesion between these two approaches. As noted above, it cannot be excluded that the existence or absence of terrorist intent is taken into consideration when interpreting the requirement of endangerment. At the same time it is conceivable that the existence of terrorist intent will be inferred from the nature and context of the specific behaviour. This does not alter the fact that both approaches are clearly and essentially different. The first approach, in which the degree of endangerment is the key issue, is objective in nature. Contrastingly, the second approach is subjective in nature.

### 2.3. COMMISSION'S APPROACH

As noted above, no clear choice was made during the realisation of the Framework Decision as to how the second part of Article 1(1) should be interpreted. The Commission's original proposal for the Framework Decision on combating terrorism appears to have made the distinction between terrorist and non-terrorist offences primarily on the basis of the existence or the non-existence of terrorist intent.<sup>18</sup> The Commission's reports evaluating the implementation of the Framework Decision by the Member States do not explicitly indicate how the Commission views the meaning of the second part of Article 1(1).<sup>19</sup> Simply nothing is said about whether or not to include the second part as an objective requirement for qualifying punishable behaviour as a terrorist offence. It can be concluded from this that the Commission does not in any case object to a Member State's inclusion of such a requirement as an element in national regulations.<sup>20</sup> If the Commission did not regard the second part of Article 1(1) as an independent requirement for qualifying punishable behaviour as a terrorist offence, it would most likely have raised an objection and claimed that, by including such a requirement in national regulations, Member States were setting more stringent requirements than allowed by the Framework Decision.

It should also be noted that the Commission does not criticize Member States electing *not* to implement the second part of Article 1(1) as an independent requirement. In my opinion, this can be explained by the fact that the Framework Decision strives for minimum harmonisation.<sup>21</sup> The Framework Decision does not preclude Member States from setting less stringent requirements; in other words, making it easier to qualify punishable behaviour as a terrorist offence. This means

<sup>18</sup> Explanatory Memorandum, COM(2001) 521 final, p. 7. Cf. also B. Saul 2006, p. 163.

<sup>19</sup> See COM(2004) 409 final, SEC(2004) 688, COM(2007) 681 final and SEC(2007) 1463.

<sup>20</sup> As, for instance, in the case of Belgium (Article 137(1) Belgian Criminal Code, see V. Hameeuw 2005, pp. 5–6) and Germany (§129a, subsection 2, German Criminal Code).

<sup>21</sup> The legal basis for the Framework Decision is found in Article 31(1)(e) of the former EU Treaty, pursuant to which measures can be adopted to draw up *minimum* regulations with respect to the elements of criminal acts and with respect to punishment.



that it is ultimately up to each Member State to decide whether to include the requirement of endangerment contained in the second part of Article 1(1) as an element in national regulations on terrorist offences.

## 2.4. CONCLUSION

Based on the above considerations it can first be concluded that it is difficult to establish whether the Framework Decision regards the requirement of endangerment contained in Article 1(1) to be an element of terrorist offences. Several interpretations are defensible. However, the practical importance of that debate – and this is the second conclusion – is minor as the Framework Decision leaves Member States the freedom to deviate from the description in Article 1(1) insofar as they are allowed to set fewer requirements than those set out in the Framework Decision. The fact remains, however, that the nature of the specific behaviour is not necessarily completely without significance, even if a Member State does not include the requirement of endangerment in its national penal system. That significance, however, relates first and foremost to whether there is deemed to be terrorist intent. Proof of terrorist intent depends not only on what those involved state as their motives, but also on objective circumstances that may be taken into consideration. These may include the extent to which a country or international organisation has been, or could have been, seriously damaged. In that case, the approach opted for is subjective in nature, but allows the existence of terrorist intent to be assumed partly on the basis of objective circumstances. The Framework Decision allows this approach.

## 3. POSITION OF ACTIVISTS, DEMONSTRATORS AND STRIKERS

### 3.1. TERRORIST INTENT AS A DISTINGUISHING CRITERION

In order to clarify the position of activists, demonstrators and strikers under the Framework Decision on combating terrorism, it is important – for the reasons stated below – to specifically interpret the meaning of terrorist intent. According to the Framework Decision, terrorist intent can occur in three forms: *a.* the offender intends to seriously intimidate a population, *b.* the offender intends to unduly compel a government or international organisation to perform or abstain from performing any act, or *c.* the offender intends to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Interestingly, from an international perspective it is not common to require a terrorist intent. Several treaties relating to certain terrorist acts have been adopted

since 1963.<sup>22</sup> Most of these do not, however, contain a specific description of the ‘terrorist’ aspect of such acts, but merely refer to a certain type of offences. Terrorism is combated in this framework by applying ‘normal’ investigative powers and coercive measures, as well as through prosecutions for ‘ordinary’ criminal acts. This allows an adequate response to terrorist activities, providing sufficient facilities are in place to investigate, prosecute and punish the acts in question.

The Framework Decision on combating terrorism opts, however, for a different approach in this respect as it specifically regards terrorist intent, at least in part, as an distinguishing criterion. Whether this is the best choice is open to discussion, which I will not enter on this occasion.<sup>23</sup> Considering that terrorist intent has been given such a prominent place in the Decision, it is important to clarify the meaning and scope of this intent.

### 3.2. MEANING OF TERRORIST INTENT

A much debated question in literature is the relationship between terrorist intent and the political or ideological motives underlying the act.<sup>24</sup> Does terrorist intent coincide with such a motive, or should intent and motive be distinguished from each other? The three-way classification formulated by Weigend, based on the study of various international regulations relating to the combating of terrorism, is instructive in this respect. He writes:

“Terrorists typically pursue a triple goal: they have ‘normal’ intent to commit the base crime of murder, bombing, assault, etc.; they intend, further, to intimidate a group or the population as a whole and/or to compel others to take action (e.g. to release political prisoners); and they have ulterior political or ideological motives, e.g. to destabilize the present government or to defeat a rival religion or ideology. Legal instruments differ as to the extent to which they require all or only some of these ideal-typical subjective elements for a terrorism conviction”.<sup>25</sup>

Considering the text of Article 1(1), it can be noted that “ulterior political or ideological motives” do not form part of the definition of terrorist offences. It is sufficient for the offender to act with ‘normal’ intent, as well as with terrorist intent within the meaning

<sup>22</sup> For a detailed discussion of this, see B. Saul 2006, pp. 129–190.

<sup>23</sup> See, for example, T. Weigend 2006, pp. 918–922 and H. van der Wilt, ‘In Search of Motive: Conceptual Hazards in the Quest for a Proper Definition of Terrorism’, in: G. Molier, A. Ellian & D. Suurland (eds.), *Terrorism: Ideology, Law and Policy*, Dordrecht: Republic of Letters Publishing 2011, p. 241–244.

<sup>24</sup> Religious motives could also be added to political and ideological motives. However, I consider religious motives also to be political or ideological motives as religious beliefs, in the context of terrorism, are commonly closely connected to, or can be translated into, political and ideological ideas. This does not alter the fact that what is stated in the main text also applies to religious motives, if these are to be considered a separate category.

<sup>25</sup> T. Weigend 2006, p. 923.

of Article 1(1) of the Framework Decision.<sup>26</sup> This choice is not entirely self-evident. It is specifically the existence of such a motive that is usually seen as an essential element of a terrorist act.<sup>27</sup> At the same time, there are a number of reasons as to why political or ideological motives should *not* be included in *legal* definitions of terrorism.<sup>28</sup> First of all, there are many criminal law systems in which motive does not play a role. It is the act that is punishable, not the motive behind it. Closely related to this is the second reason: the impression should be avoided that the prosecution is driven first and foremost by a person's political or ideological views. Not requiring a political or ideological motive avoids the need to identify the existence of such a motive during the investigation and trial phase. Thirdly, proving a motive can be problematic as it can be difficult to demonstrate that an offender has a deep-rooted drive if the motive does not manifest itself in some way. Fourthly, delineating the terms 'political' and 'ideological' may cause controversy.

Terrorist intent distinguishes itself from political and ideological motives in that it does not refer to an offender's deep-rooted drive,<sup>29</sup> but rather to the effect pursued through the conduct. A key aspect is that it can be established *that* the offender intends to seriously intimidate a population and so on, but not *why* he is pursuing that objective. The terrorist intent will usually, of course, follow from a political or ideological motive, and the desired aim – to seriously intimidate a population and so on – will usually also be a means to achieving a political or ideological goal. However, a court wanting to regard an act as a terrorist offence does not have to establish what the motive behind the act is.

The above shows that, as far as *terminology* is concerned, a clear distinction can and should be made between political and ideological motives on the one hand and terrorist intent on the other. This applies in any case in relation to Article 1(1) of the Framework Decision.<sup>30</sup> The question arises, however, as to whether such a strict distinction can also be made in a *substantive sense*. Can terrorist intent indeed be established without any regard for the offender's political or ideological motives? Proof of terrorist intent will in any event be easier to establish if the offender's political

<sup>26</sup> Cf. E. Dumitriu 2004, pp. 596–597; S. Voigt 2006, pp. 216–217 and T. Weigend 2006, p. 924. E.J. Husabø 2005, p. 60, distinguishes less sharply between terrorist intent and the motive. He appears to equate terrorist intent with the motive ('the subjective motivation').

<sup>27</sup> T. Weigend 2006, pp. 923–924.

<sup>28</sup> On this, see B. Saul 2006, pp. 40–45, who also adds some comments qualifying these reasons. See also in this respect the debate between B. Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient of Criminalising Thought?', in: A. Lynch, E. MacDonald & G. Williams (eds.), *Law and Liberty in the War on Terror*, Sydney: Federation Press 2007, p. 28–38 and K. Roach, 'The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive', in: A. Lynch, E. MacDonald & G. Williams (eds.), *Law and Liberty in the War on Terror*, Sydney: Federation Press 2007, p. 39–48.

<sup>29</sup> Or, in the words of B. Saul 2007, p. 28: "the emotion or belief prompting the prohibited physical conduct".

<sup>30</sup> Whether such a distinction can be made as strictly in the context of national law, given the manner in which terms such as intent and motive are used, is a different matter, and one that I will not discuss here.

or ideological motives are known.<sup>31</sup> It is not unusual for offenders or an underlying organisation to claim responsibility for terrorist attacks and to provide an explanation as to the underlying motives. If, however, an offender's political or ideological motives are unclear, the existence of terrorist intent – and thus to a certain extent the underlying motive, too – could be inferred from objective circumstances such as the nature and context of the specific behaviour. Therefore, knowledge of the political or ideological motives is not strictly necessary.<sup>32</sup>

Another relevant question is whether the definition of terrorist offences becomes too broad if political and ideological motives are disregarded. Does ignoring them carry the risk of including conduct within the scope of the definition that generally is not regarded as a terrorist act? In answering this question we can draw on Saul's conclusion that "there is considerable support for the view that terrorism is *political* violence". Thus, terrorist acts distinguish themselves from "privately motivated violence".<sup>33</sup> Saul argues that a requirement such as terrorist intent is insufficient to distinguish between these two forms of violence. The existence of terrorist intent can stem from "private concerns such as blackmail, extortion, criminal profit or even personal duties".<sup>34</sup> Possible examples could include people planting bombs in random places, while indicating that they are willing to stop these acts in return for a large sum of money. In such cases the offenders can be said to be aiming to seriously intimidate the population (as anyone can be a victim of these bombs) and that terrorist intent therefore exists, while this intent does not stem from political or ideological motives, but instead purely from financial considerations. If such forms of "privately motivated violence" are to be distinguished from typical terrorist acts, the underlying motive has again to be considered.<sup>35</sup>

It cannot generally be distilled from the legislative history of the Framework Decision on combating terrorism as to how the drafters dealt with the matter of whether to stipulate the existence of political or ideological motives as a requirement for qualifying punishable behaviour as a terrorist offence. Whether this has to do with the reasons given above for not including political or ideological motives in the legal definition of terrorism, or with an approach as to what should be considered terrorist that is fundamentally different from Saul's aforementioned opinion, cannot be said

<sup>31</sup> Cf. about possible complications: B. Saul 2006, p. 42.

<sup>32</sup> Inferring a terrorist intent from objective circumstances carries a certain risk as the distinction between terrorist and non-terrorist crimes does not lie solely in the act that is carried out. The distinction lies more, at least in part, in the objective – the terrorist intent – of the offender. If this specific subjective requirement is objectified too much, the distinction between terrorist and non-terrorist offences will blur. See T. Weigend 2006, p. 924.

<sup>33</sup> B. Saul 2006, p. 38.

<sup>34</sup> B. Saul 2006, p. 61 and B. Saul 2007, p. 30.

<sup>35</sup> B. Saul 2006, p. 61 and B. Saul 2007, p. 29. For a contrary view, see Roach 2007, p. 47, who – without giving specific reasons – argues that applying terrorist intent as a requirement "allows most crime committed for financial gain to be distinguished from those designed to change governmental policy or scare the public at large".

with certainty.<sup>36</sup> The only thing that is clear is that such a requirement has not been set. Due to this, the Framework Decision has avoided stipulating a requirement that may be difficult to apply. At the same time, the scope of the definition of terrorist offences has proved to be rather broad in that it can also include behaviour that is not typically terrorist. More remains to be said, however, about terrorist intent within the meaning of Article 1(1) of the Framework Decision. During the process of drafting the Framework Decision, some attention was paid to the scope of the definition of terrorist offences, specifically with regard to the position of activists, demonstrators and strikers.

### 3.3. DELINEATION REGARDING ACTIVISTS, DEMONSTRATORS AND STRIKERS

During the realisation of the Framework Decision, the drafters decided to further delineate the definition of terrorist offences in a variety of ways. Apparently, this is because the Commission's original proposal for this Framework Decision, as the Explanatory Memorandum indicates, also had to cover "acts of urban violence".<sup>37</sup> Such violence is easily associated with violence occurring as part of demonstrations by anti-globalists and other political activists.<sup>38</sup> This was opposed by several Member States as demonstrations, strikes and other forms of protest cannot and should not be linked to terrorism.<sup>39</sup> Before dealing with the legal interpretation of this issue, it is useful to indicate when demonstrations, strikes and other forms of protest could fall within the scope of the definition of terrorist offences. The basic requirement is for a criminal act as referred to in Article 1(1) of the Framework Decision to be committed. Where criminal acts are committed during demonstrations, strikes or other forms of protest, they will not usually be regarded as punishable behaviour within the meaning of Article 1(1), which includes attacks upon a person's life and seizure of aircraft. But is not completely unrealistic either. An example would be the causing of extensive destruction as referred to in Article 1(1)(d). If such a criminal act were to be committed, the objective of the protest action – which is usually aimed at changing or, conversely, maintaining an existing situation – could be linked to terrorist intent, specifically the intent to unduly compel a government (or international organisation) to perform or abstain from performing any act. This is not precluded by the text of Article 1(1) of the Framework Decision.<sup>40</sup> The question, however, is whether this is also intended.

<sup>36</sup> Cf. for instance the argument of Roach, 2007, who claims that political or ideological motives should *not* play a role in the legal definition of terrorism.

<sup>37</sup> Explanatory Memorandum, COM(2001) 521 final, p. 11.

<sup>38</sup> The Commission's proposal was published shortly after protests by anti-globalists had taken place in Gothenburg and Genoa. In addition, according to O. Gross & F. Ní Aoláin, *Law in Times of Crisis. Emergency Powers in Theory and Practice*, Cambridge: Cambridge University Press 2006, p. 415, comments on the proposal were published on the Commission's website in which reference was made to "radicals committing violence".

<sup>39</sup> O. Gross & F. Ní Aoláin 2006, pp. 415–416.

<sup>40</sup> See also E. Symeonidou-Kastanidou 2004, pp. 27–28 and F. Verbruggen 2004, p. 324.

This issue received attention during the negotiations on the text of the Framework Decision. It can be concluded from Council documents that a majority of the Member States wanted to tie in with the description of terrorism as expressed in the UN Convention on Suppression of Financing of Terrorism, while other Member States pressed for “the most stringent definition possible, in order to ensure that legal action, as, for example, in the framework of actions by union or anti-globalisation groups, could under no circumstance fall within the scope of application of the framework decision”.<sup>41</sup> The way in which terrorist intent is worded in the final Framework Decision is described as “a text (...) which achieves a balance between the need to effectively combat terrorist crimes and, at the same time, guarantees the fundamental rights and freedoms”.<sup>42</sup> Although not explicitly stated in Council documents, the Member States appear to have attempted to achieve this balance by adding the word “unduly” in that part of the definition of terrorist intent that pertains to compelling a government or international organisation to perform or abstain from performing any act, whereas this word is absent in the UN convention.

The concerns about the position of activists, demonstrators and strikers influenced the Framework Decision in other respects, too. Firstly, the text of Article 1(2) of the Framework Decision stipulates that the Framework Decision “shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”. This provision is, to some degree, worked out in more detail in the preamble. The preamble states under 10 *inter alia* that:

“Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate”.

Note can also be taken of the joint and unanimous statement prepared by the Member States at the time of the adoption of the Framework Decision on combating terrorism:

“The Council states that the Framework Decision on the fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded. (...) Nor can it be construed so as to incriminate on terrorist grounds persons exercising their fundamental right to manifest their opinions, even if in the course of the exercise of such right they commit offences”.<sup>43</sup>

<sup>41</sup> See Council document 12647/2/01 REV 2, p. 2 and Council document 12647/3/01 REV 3, p. 2.

<sup>42</sup> *Ibid.*

<sup>43</sup> See declaration 109/02, included in Annex II of Council document 11532/02.

The fact that delineation was sought along various lines indicates that, in spite of the balance the parties attempted to achieve when defining terrorist intent, the text of Article 1(1) of the Framework Decision does not in itself draw any clear demarcation line between terrorist and political activist behaviour.<sup>44</sup> At that same time, the text of Article 1(2), the preamble and the statement together show that punishable behaviour occurring in a situation in which fundamental rights, specifically the right to strike and freedom of expression, are exercised should not be considered a terrorist offence.<sup>45</sup>

But have sufficient safeguards been put in place to ensure that the behaviour in such cases will not be qualified as terrorism? Peers has pointed out that when interpreting European law, the European Court of Justice tends not to assign much significance to statements given at the time of legal instruments being established if the contents of these statements cannot be found in the text of the regulation concerned.<sup>46</sup> For that reason, Peers claims that “the legal effect of the statement” is uncertain.<sup>47</sup> Two arguments can be raised against this stance. First of all, it is important to note that although the European Court of Justice does not consider itself bound in general to include Member States’ statements in the interpretation of European law, this does not mean that such statements are categorically excluded from being an aid to interpreting that law. There are examples of cases in which the Court, directly or indirectly, has made use of statements, both unanimous and otherwise, of Member States.<sup>48</sup> Secondly, Peers seems to ignore the fact that the contents of the statement in this case tie in closely with the provisions of Article 1(2) of the Framework Decision and that the contents can in that sense be found in the text of the regulation concerned. Although the text of the statement is admittedly far more specific than the text of Article 1(2), the European Court of Justice seems in situations such as these to adopt a generous stance and to be prepared to further specify the text of the regulation, using a statement by the Member States.<sup>49</sup> In addition, the text of the preamble, too, can play an important role in the interpretation.<sup>50</sup>

There is no obstacle, therefore, to take the text of Article 1(2), the preamble and the statement in consideration in the interpretation of Article 1(1). When these sources are considered in relationship to each other, the result, in my opinion, is that the

<sup>44</sup> Cf. also E.J. Husabø 2005, pp. 62–63 and O. Gross & F. Ni Aoláin 2006, pp. 416–417.

<sup>45</sup> S. Peers 2003, p. 237. Cf. also S. Voigt 2006, p. 227 and B. Saul 2006, p. 165.

<sup>46</sup> S. Peers 2003, p. 236, with reference to ECJ 26 February 1991, case C-292/89 (*Antonissen*), ground 18. See also *inter alia* ECJ 13 February 1996, Cases C-197/94 and C-252/94 (*Bautiaa and Société Française Maritime*), ground 51; ECJ 17 October 1996, cases C-283/94, C-291/94 and C-292/98 (*Denkavit International*), ground 29 and ECJ 8 June 2000, case C-375/98 (*Epson Europe*), ground 26.

<sup>47</sup> S. Peers 2003, p. 236. Cf. also S. Peers, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press 2011, p. 786.

<sup>48</sup> On this see *inter alia* S. Schönberg & K. Frick, ‘Finishing, refining, polishing: on the use of *travaux préparatoires* as an aid to the interpretation of Community legislation’, *European Law Review* 2003, pp. 165–167.

<sup>49</sup> Cf. ECJ 3 December 1998, case C-368/96 (*Generics*), grounds 25–27.

<sup>50</sup> See, for example, ECJ 3 May 2007, case C-303/05 (*Advocaten voor de Wereld*), ground 28.



description of terrorist offences must be interpreted in such a manner that terrorist intent cannot be inferred from the mere fact that an act involves a protest, demonstration or strike in which punishable behaviour within the meaning of Article 1(1) occurs. This will prevent a situation in which rallies in which pressure to change or maintain a certain situation is exerted in a legitimate way are suddenly considered terrorist if they spiral out of control. At the same time, the interpretation advocated here will prevent punishable behaviour from escaping being regarded as a terrorist offence simply on the grounds that it has to be regarded as protest action.

One thing should be noted, however. As stated above, the Framework Decision strives for minimum harmonisation. It does not preclude Member States from stipulating that fewer requirements need to be met for punishable behaviour to qualify as a terrorist offence. Member States can in principle, therefore, opt to disregard the restriction on the concept of terrorist offences in relation to activists, demonstrators and strikers, as understood in respect of the Framework Decision. As soon, however, as Member States use that freedom, they also need to realise that fundamental rights such as the freedom of expression will also independently impose restrictions. It is precisely because of these fundamental rights, which the Framework Decision on combating terrorism does not seek to affect adversely, that it may be expected of the Member States that they will respect the limits ensuing from the Framework Decision.

#### 4. CONCLUSION

As explained here, the second part of the definition of terrorist offences in Article 1(1) of the Framework Decision does not compel Member States to include a requirement of endangerment in national regulations penalizing these offences. Strictly speaking, the second part could therefore be omitted from the definition. Member States are, however, free to opt to include a requirement of endangerment in order to avoid the scope of application of the concept of terrorist offences becoming too broad. The second part could also be regarded as relevant for objectively establishing terrorist intent. It has been shown, in relation to the position of activists, demonstrators and strikers, that the description of terrorist offences must be interpreted in such a manner that terrorist intent cannot be inferred from the mere fact that an act involves a protest, demonstration or strike in which punishable behaviour within the meaning of Article 1(1) occurs at some point. Insofar as not already apparent from the description of terrorist offences in national criminal law, the court is in this respect obliged to interpret the description of the offence in conformity with the Framework Decision.